

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
Illinois Power Company	:	03-0757
	:	
Proceeding pursuant to Section 16-111(g) of the Public Utilities Act concerning proposed transfer of generating plant.	:	

ORDER INITIATING PROCEEDING

By the Commission:

On November 14, 2003, Illinois Power Company ("Company", "Illinois Power", "IP", or "respondent") filed a notice ("Notice") with the Illinois Commerce Commission ("Commission") pursuant to Section 16-111(g) of the Public Utilities Act ("Act"). The Notice states that IP "is entering into a First Amendment to the Sublease dated as of October 1, 1999 between Illinois Power, as sublessor, and Dynegy Midwest Generation, Inc. ("DMG. . ."), as sublessee, relating to . . . [the "Equipment", consisting of] the combustion turbine ["CT"] generating units and associated equipment located at the site commonly referred to as the Tilton Energy Center." According to the Notice, "[t]he purpose of the Amendment is to clarify that, as a result of Illinois Power exercising the 'Purchase Option' under that certain amended and restated Participation Agreement dated October 20, 2002, by and among Illinois Power, as Lessee, ABN AMRO Bank, N.V., as Agent Lessor, and certain other participants, DMG will be designated as the recipient of the Equipment, and will be entitled to receive delivery of the Bill of Sale for the Equipment from the Agent Lessor."

The Notice further states that "[t]he Amendment will clarify that upon termination of the Participation Agreement, Illinois Power's residual interest in the Equipment, as lessee, will be transferred directly by the Agent Lessor to DMG, DMG will reimburse IP for the purchase price due from IP to the Agent Lessor for the residual value of the Equipment, and the Agent Lessor will deliver the Bill of Sale for the Equipment to DMG."

According to the accounting entries attached to the notice, IP intends to record a sale of electric plant to DMG in the amount of \$66,400,000, and an "account[] receivable from associated companies" from DMG in the amount of \$66,400,000.

Background

The Commission has received a Staff Report dated December 9, 2003 ("Staff Report"). The Staff Report provides the background that the generating plant at the Tilton Energy Center has been the subject of at least three notices that IP has filed with the Commission under Section 16-111(g). The Staff Report recites that in a notice filed on March 31, 1999 (the "March 1999 Notice"), IP stated that it was transferring certain assets, including the CT Units at Tilton Energy Center, to an unaffiliated special purpose entity ("SPE") "to obtain off balance sheet financing of the Assets whereby Illinois Power's interest in the Assets will be treated for accounting purposes in a manner similar to a lease of the Assets under an operating lease."

The Staff Report recites that on April 16, 1999, IP filed a notice of transfer of certain generating facilities ("April 1999 Notice"), which included the Tilton CT Units, to Illinova, its corporate parent, which was then to transfer the generating facilities to another of its subsidiaries, Illinois Power Marketing, Inc., also referred to in the April 1999 Notice as "WESCO." On April 21, 1999, the Commission issued an order initiating Docket No. 99-0209 pursuant to Section 16-111(g)(vi) of the Act to determine whether IP's proposed sale of the electric generating plants listed in the April 1999 Notice should be approved or prohibited. On July 8, 1999, the Commission entered an Order in that proceeding which approved the transfer of Illinois Power Company's fossil generating station assets, as described in Section III of the Order, including "[a]ll real and personal property owned by IP at the Tilton combustion turbine ("CT") site as well as all leasehold interests and contract rights in connection with the Tilton site and the four CT units being installed at that site (except for transmission and gas supply assets remaining with IP)."

On July 14, 1999, IP filed another Notice to the Commission of the Transfer of Certain Assets Pursuant to 220 ILCS 5/16-111(g) ("July 1999 Notice"). The July 1999 Notice, by its terms, "amends and modifies the notice previously delivered to you on March 31, 1999". The new notice of the transfer of assets included only the Tilton CT Units, and stated that they would be transferred to ABN AMRO Bank N.V. ("ABN AMRO") instead of to the SPE. The Staff Report includes two quotes from the July 1999 Notice:

The Assets will be transferred as part of a sale/leaseback transaction which will enable Illinois Power to obtain off balance sheet financing of the Assets whereby Illinois Power's interest in the Assets will be treated for accounting purposes in a manner similar to a lease of the Assets under an operating lease. Under the sale/leaseback transaction, Illinois Power will retain full operational use and control of the Assets."

July 1999 Notice, page1

Transfer of the CT units to the Bank as part of the off-balance sheet financing will not affect IP's use and control of the CT Units, or its need for a permanent certificate, under the sale/leaseback arrangements. Illinois Power will have full responsibility and entitlement to use, operate and maintain the CT Units and associated facilities on an "as if owned" basis.

July 1999 Notice, page 2

The Staff Report states that on September 10, 1999, ABN AMRO Bank purchased the Tilton CT Units, and under the sale/leaseback agreement, IP then leased the Tilton CT Units from ABN AMRO. IP also entered into a sublease for the units with Illinova subsidiary WESCO.

November 2003 Notice

The Staff Report quotes the following from the November 2003 Notice: “[t]he Amendment will clarify that upon termination of the Participation Agreement, Illinois Power’s residual interest in the Equipment, as lessee, will be transferred directly by the Agent Lessor to DMG, DMG will reimburse IP for the purchase price due from IP to the Agent Lessor for the residual value of the Equipment, and the Agent Lessor will deliver the Bill of Sale for the Equipment to DMG. The end result will be that DMG will be the owner of the Equipment, and Illinois Power will be fully reimbursed by DMG for the purchase price of the Equipment that IP will owe the Agent Lessor pursuant to the Participation Agreement.”

One of the “Attachments to Notice Letter” is entitled “First Amendment to Sublease.” That document contains the following recitals:

WHEREAS, Sublessor and Sublessee are parties to that certain Sublease dated October 1, 1999 (the “Sublease”) by and between Sublessor [IP] and Sublessee [DMG], pursuant to which Sublessor subleases to Sublessee certain Equipment; and

WHEREAS, pursuant to Article III of the Sublease, Sublessee is obligated to pay to Sublessor, as Rent, all amounts owed by Sublessor to Agent Lessor under the Lease, including the Purchase Amount payable by Sublessor to Agent Lessor pursuant to Section 19.1(a) of the Lease following exercise of the Purchase Option upon expiration of the Lease; and

WHEREAS, pursuant to Section 21.1(a) of the Lease, Sublessor is entitled to cause the bill of sale with respect to the Equipment (the “Bill of Sale”) purchased upon exercise of the Purchase Option to be delivered to Sublessor’s designee; and

WHEREAS, it has been and is the intention of the parties that Sublessee be the recipient of (and designee with respect to) the Bill of Sale in the event the Sublessor elected to exercise the Purchase Option under the Lease, and this Amendment is made for the avoidance of doubt to expressly state that intention of the parties; and

WHEREAS, on September 15, 2003, Sublessor delivered notice of its intention to exercise the Purchase Option upon the expiration of the Lease in September 2004; and

WHEREAS, the parties desire to amend the Sublease to reflect the foregoing intent and obligate Sublessor to cause Agent Lessor to deliver the Bill of Sale to Sublessee upon exercise of the Purchase Option;

NOW, THEREFORE, in consideration of the foregoing, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Sublessor and Sublessee agree as follows:

[November 2003 Notice, first attachment, page 1; emphasis in original]

The First Amendment to Sublease itself changes certain definitions, and adds a new Section 3.3 as follows:

Section 3.3. Exercise of Sublessor's Purchase Option. In the event the Sublessor exercises its Purchase Option under Section 19.1(a) of the Lease, with respect to which the Sublessee is obligated to pay the Purchase Amount, then upon termination of the Lease with respect to the Equipment, the Sublessor shall instruct the Agent Lessor, in accordance with the Sublessor's rights arising under Section 21.1(a) of the Lease and upon payment to the Agent Lessor of the Purchase Amount, to deliver to the Sublessee, in the name of the Sublessee, the bill of sale with respect to Agent Lessor's interest in the Equipment.

[November 2003 Notice, first attachment, page 2; emphasis in original]

Reading the letter notice together with the Recitals and the substantive amendment to the Sublease quoted above, and taking into account the fact that IP has already expressed to the Agent Lessor its desire to exercise the Purchase Option of September 10, 2004, Staff concludes that IP is, by this notice, informing the Commission that it is contractually binding itself to an assignment of all of its interest in the Equipment to DMG.

Staff suggests that a comparison of the April 1999 Notice to the November 2003 Notice is instructive. The April 1999 Notice was for the transfer by IP of the Tilton Energy Center Equipment (or of its rights under the lease resulting from a sale and leaseback) to Illinova for subsequent transfer to another IP affiliate in the Illinova system. The November 2003 Notice is for IP action to contractually bind itself to the transfer of the right to own the Equipment to Dynegy Midwest Generation, a subsidiary of Dynegy, Inc. ("Dynegy"). Dynegy became the corporate parent of IP as the result of a reorganization that occurred after the Commission's consideration of the fossil plant transfers to Illinova in Docket No. 99-0209. While both Notices contemplate the transfer of property rights by IP in exchange for an affiliate's promise to pay, Staff believes that the newly filed Notice may bear close scrutiny

because of differences between the financial circumstances of Illinova and its subsidiaries in 1999, on the one hand, and those of Dynegy and its subsidiaries in 2003, on the other.

Section 16-111(g) of the Act—Net dependable generating capacity

Section 16-111(g)(vi) of the Public Utilities Act [220 ILCS 5/16-111(g)(vi) provides in relevant part:

(vi) In addition, if the electric utility proposes to sell, assign, or lease... an amount of generating plant that brings the amount of net dependable generating capacity transferred pursuant to this subsection to an amount equal to or greater than 15% of its net dependable capacity on the effective date of this amendatory Act of 1997...the electric utility shall provide, in addition to the information listed in subparagraphs (i) through (v), the following information: (A) a description of how the electric utility will meet its service obligations under this Act in a safe and reliable manner and (B) the electric utility's projected earned rate of return on common equity, calculated in accordance with subsection (d) of this Section, for each year from the date of the notice through December 31, 2004 both with and without the proposed transaction. If the Commission has not issued an order initiating a hearing on the proposed transaction within 30 days after the date the electric utility's notice is filed, the transaction shall be deemed approved. The Commission may, after notice and hearing, prohibit the proposed transaction if it makes either or both of the following findings: (1) that the proposed transaction will render the electric utility unable to provide its tariffed services in a safe and reliable manner, or (2) that there is a strong likelihood that consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection (d) of this Section. Any hearing initiated by the Commission into the proposed transaction shall be completed, and the Commission's final order approving or prohibiting the proposed transaction shall be entered, within 90 days after the date the electric utility's notice was filed.

As noted above, IP's April 1999 Notice resulted in Docket No. 99-0209. In that proceeding, the Commission considered IP's proposed sale of some 80% of its net dependable generating capacity as of December 16, 1997, under the standards set forth in Section 16-111(g)(vi) of the Act. The Commission concluded on the basis of the evidence in that case that it should approve the transfer of IP's fossil generation assets, including the Tilton Energy Center Equipment.

The Staff Report states that the generating capacity of the four combustion turbine generating units at the Tilton Energy Center (the "Equipment" the ownership rights in which are to be transferred to DMG under the terms of the November 14, 2003, Notice) is approximately 44 megawatts ("MW") each, for a total of approximately 176 MW. The Staff

Report further states that according to information furnished to Staff by Illinois Power on December 17, 1998, Illinois Power's net dependable generating capacity as of December 16, 1997 was 4663 MW winter capacity and 4571 MW summer capacity.

The Staff Report further states that according to other information furnished to Staff by IP in December 1998, the net dependable capacity of the plants the transfer of which was the subject of Docket No. 99-0209 was 3714 MW winter capacity and 3641 MW summer capacity. Even without the 176 megawatts of Tilton Energy Center capacity, then, the amount of net dependable generating capacity transferred under Section 16-111(g) as a result of the April 16, 1999, notice and the Commission's action in Docket No. 99-0209 far exceeded 15% of the net dependable generating capacity as of December 16, 1997. The net dependable generating capacity of IP's proposed Tilton Energy Center Equipment assignment, when added to net dependable generating capacity IP has already transferred under Section 16-111(g) (exclusive of any leasehold rights previously transferred by IP), must therefore, "bring[] the amount of net dependable generating capacity transferred pursuant to [subsection (g) of Section 16-111 of the Act] to an amount equal to or greater than 15% of its net dependable capacity on the effective date of this amendatory Act of 1997."

Recommended proceeding

The Staff Report states that the 2003 Notice contains the information required of all Section 16-111(g) filings by subsection (i) through (iv) of that Section, but that it does not mention or fulfill the requirements imposed with respect to a noticed transaction that "brings the amount of net dependable generating capacity transferred pursuant to this subsection to an amount equal to or greater than 15% of its net dependable capacity on the effective date of this amendatory Act of 1997." Additional requirements are imposed upon such transfers in Section 16-111(g)(v) and 16-111(g)(vi). Based on the analysis set forth in its Report, Staff's view is that the 2003 Notice, including the attachments, would effectuate an assignment to DMG of IP's right to own the Tilton Energy Center Equipment. Staff thus views the transaction as subject to the additional requirements of Section 16-111(g)(v) and (vi), and recommends that the Commission initiate a proceeding to determine whether the proposed transaction should be approved or prohibited under the standards set forth in Section 16-111(g)(vi). The Commission accepts this recommendation.

Section 16-111(g)(vi) addresses the time for completion of a proceeding to consider a notice subject to that provision in this way:

Any hearing initiated by the Commission into the proposed transaction shall be completed, and the Commission's final order approving or prohibiting the proposed transaction shall be entered, within 90 days after the date the electric utility's notice was filed.

Given the omission of required information, the Commission believes, subject to considering any evidence or legal argument to the contrary that it may receive, that it

cannot be bound by the 90 day timeline imposed by Section 16-111(g)(vi) until such time as IP has complied with all of the filing requirements of Section 16-111(g)(v) and 16-111(g)(vi). In other words, the Commission construes the quoted language as providing it with 90 days to consider a properly filed notice.

The Commission also notes, as an independent basis for initiating this investigation, its obligations under Section 4-101 of the Act. In pertinent part, that Section provides as follows:

The Commerce Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine those public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with this Act and any other law, with the orders of the Commission and with the charter and franchise requirements.

220 ILCS 5/4-101

The Commission, being fully advised in the premises, is of the opinion and finds that:

- (1) Illinois Power Company is a public utility, as defined in Section 3-105 of the Public Utilities Act, that has a franchise, license, permit or right to furnish or sell electricity to retail customers within a service area;
- (2) the Commission has jurisdiction over respondent and the subject matter of this proceeding;
- (3) the materials filed by respondent on November 14, 2003, notifying the Commission of the intended sale of specified electric generating plants should be made a part of the record of this proceeding;
- (4) the Staff Report dated December 9, 2003, should be made a part of the record of this proceeding;
- (5) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;
- (6) the Commission should initiate a proceeding pursuant to Section 16-111(g)(vi) of the Public Utilities Act to examine the transactions described in

the November 2003 Notice and to determine whether the proposed transfer of the specified electric generating plants should be approved or prohibited under the standards set forth in Section 16-111(g)(vi) of the Act;

- (7) this proceeding should be scheduled to result in a Commission order no more than 90 days after the date the respondent files a notice that complies with all requirements of Section 16-111(g) of the Act, including subsections (g)(v) and (g)(vi).

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that, pursuant to Section 16-111(g)(vi) of the Public Utilities Act, a proceeding is initiated to determine whether the proposed transfer of the specified electric generating plants should be approved or prohibited, and to examine the transactions described in the November 2003 Notice in accordance with the Commission's obligations under Section 4-101 of the Act.

IT IS FURTHER ORDERED that Illinois Power Company is made respondent to this proceeding and shall show cause and present evidence why the proposed sale of electric generating plants should be approved.

IT IS FURTHER ORDERED that, given the apparent inapplicability of the statutorily imposed time constraints, the schedule for this proceeding will be created in accordance with finding (7) of this Order, subject only to further order of this Commission.

IT IS FURTHER ORDERED that the Chief Clerk serve a copy of this Order on the designated agent of respondent.

IT IS FURTHER ORDERED that the Chief Clerk mail a copy of this Order to those municipalities served in Docket No. 02-0743, and that respondent notify the Commission within 2 days after the date of this Order of any additions to that list of municipalities.

IT IS FURTHER ORDERED that the notice filed by respondent on November 14, 2003, is made a part of the record of this proceeding.

IT IS FURTHER ORDERED that the Staff Report dated December 9, 2003, is made a part of the record of this proceeding.

IT IS FURTHER ORDERED that the failure of the respondent to appear may result in the entry of an order prohibiting the proposed sale and the imposition of civil penalties pursuant to Section 5-202 of the Public Utilities Act.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

By Order of the Commission this 11th day of December, 2003.

SIGNED Edward C. Hurley

Chairman